IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

NO. 582.

WOOLFORD REALTY COMPANY, INC., *Petitioner,*

vs.

J. T. ROSE, *Collector of Internal Revenue.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE.*

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Now come the undersigned counsel for Federal Export Corporation, plaintiff in a cause now pending in the Court of Claims entitled "Federal Export Corporation v. The United States, No. H-106", and, the consent of counsel for both the Petitioner and Respondent having been first

granted, pray for leave to file the attached brief upon the points therein discussed.

LOUIS TITUS,
HENRY M. WARD,
Counsel for
Federal Export Corporation.

April 19th, 1932.

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BRIEF

SUBMITTED IN BEHALF OF FEDERAL EXPORT CORPORATION BY *AMICI CURIAE.*

FIRST.

A question is presented in the instant case which is similar to, though not identical with, that presented in the pending suit of Federal Export Corporation in the Court of Claims.

The instant case presents two principal questions; both relating solely to the construction of a tax statute.

(a). Whether with respect to an affiliated group of corporations included in a consolidated return, a loss sustained in 1925 and 1926 by a member of the group can be carried over into 1927, the tax year involved, in which year such member had no taxable income, and so be deducted in computing the consolidated income for that year under Sections 240 and 206 of the Revenue Act of 1926 (Government brief, p. 2).

(b). Whether under Section 206 of the Act of 1926, losses sustained in 1925 and 1926 when such corporation was not affiliated, can be carried over into 1927, when it was affiliated (Ibid).

We have stated the two questions separately because a decision against the petitioner on question (b) might well be held to eliminate question (a). Our client, Federal Export Corporation, is interested only in question (a). The interest arises as follows:

Federal Export Corporation, the parent company, in 1919 filed a consolidated return for the year 1918, embracing a group of seven corporations affiliated in 1918 and constituting mere incorporated branches or divisions of its corporate business organization. Certain of these affiliated corporations sustained net losses, or had small net taxable incomes in 1918. They sustained net losses in 1919 greater than the taxable incomes (if any) for 1918.

The question presented in that case is whether, under Section 204(b) of the Revenue Act of 1918, 40 Stat. 1057, 1061 (quoted in Government brief at p. 33), such losses are allowable as deductions for the affiliated group in 1918.

Thus, while the question is similar to that involved in the instant case, and, as pointed out in the Government's brief (pp. 21-22), has been passed on by the Court of Claims in the *Swift* case (38 Fed. 2d, 365) and by the Cir-

cuit Court of Appeals for the Second Circuit in *Sweets Co. v. Commissioner* (40 Fed. 2d 436), the question in Federal Export case relates to the construction of a highly remedial statute, enacted to relieve taxpayers from losses consequent upon the sudden termination of the World War, so that it is submitted that the decision of point (a) *supra,* (if decision is not eliminated) need not necessarily control the construction of another statute, the terminology of which is distinct.

SECOND.

The questions presented in the instant case, as noted, are solely questions of the construction of a taxing statute.

This court in *Old Colony Railroad Company v. Commissioner,* No. 349, October Term, 1931, decided February 15 1932, has reiterated the settled rule clearly applicable to the instant ease, as follows:

> "If there were doubt as to the connotation of the term, and another meaning might be adopted, the fact of its use in a tax statute would incline the scale to the construction most favorable to the taxpayer. *Gould v. Gould,* 245 U. S. 151; *United States v. Merriam,* 263 U. S. 171; *Bowers v. Lighterage Co.,* 273 U. S. 346; *United States v. Updike,* 281 U. S. 489; *Burnet v. Niagara Falls Brewing Co.,* 282 U. S. 649."

To elucidate the position of the Government in the instant case, stated at page 4, first paragraph of the brief, an argument is made, 25 pages in length (pp. 8-32), all devoted to the *construction* of sub-section (b) of Section 206 of the Act of 1926 (quoted at p. 35) as read *in the light of the provisions* of Sec. 240(a), (quoted pp. 36, 37.) and Sections 232 and 234 (quoted at p. 36).

Full briefs have been filed in behalf of petitioner and by *amici curiae.* We concur in the views expressed in petitioner's brief in support of the petition and brief on argument and in the brief filed by Rollin Browne, Esq.,

as *amicus curaial,* but would only supplement what they have said by the above statement of the settled and applicable rule of construction and by calling attention to an inadvertent statement in the Government's brief.

At page 11, in discussing the question of construction, the applicable rule is stated as follows:

> "If there is any doubt it should be resolved in favor of the normal method of tax computation. 'The intent to exclude must be definitely expressed where—the general language of the Act laying the tax is broad enough to include the subject-matter'. *Choteau v. Burnet,* 283 U. S. 691, 696. See also *Bowers v. Lawyers' Mortgage Co.,* 285 U. S., decided March 14, 1932; *Heiner v. Colonial Trust Co.,* 275 U. S. 232, 235; *Cornell v. Coyne,* 192 U. S. 418, 431; *Swan & Finch Co. v. United States,* 190 U. S. 143, 146; *Bank of Commerce v. Tennessee,* 161 U. S. 134, 146—"

It is submitted that this statement of the rule is tantamount to saying that where the taxpayer claims the right to a deduction under the special consolidated returns section 240 Act of 1926 and the question is whether that section is controlled by the narrow meaning attributed to the word "taxpayer" in another general section (206 (b)), the construction most favorable to the Government should be adopted.

Without burdening the Court with an extended analysis of the cases cited, it is sufficient to refer to them briefly and to point out that the excerpt quoted from *Choteau v. Burnet,* 283 U. S. 691, 696, related, not to the construction of an income tax statute, but to whether the statute which made the Indians "competent" in certain cases (Act of June 28, 1906, c. 3572 34 Stat. 539), operated to exempt royalties derived from oil and gas wells from income taxes imposed on "every individual" upon income "from any source whatever". It was held that the exemption claimed must be clearly stated in the *statute fixing the status of the Indians,* and that this status was defined, not by the

taxing Act, but by the Act which gave the Indians (with immaterial exceptions) the same taxable status as all citizens. A similar question was involved in *Heiner v. Colonial Trust Co.*, 275 U. S. 232.

In *Bowers v. Lawyers' Mortgage Company* (#355, March 14, 1932), the question was not as to the construction of the statute, but

> "whether on the admitted facts respondent was an insurance company subject to the tax imposed by Sec. 246 and therefore not taxable under Sections 230 and 1000".

As in the Indian cases, the question was as to the status of the taxpayer, not as to the construction of provisions of a tax act.

In *Cornell v. Coyne,* 192 U. S. 418, 431, an excise tax was laid on the manufacturer of filled cheese. Cheese under contract for export was manufactured and the tax paid. Recovery was sought on the ground that the tax was levied on "articles exported from a State" in violation of Section 9, Article I of the Constitution. The portion of the opinion cited (O. 431) relates to whether exported cheese was exempt from the tax imposed upon "all filled cheese which shall be manufactured". The Court says (p. 431):

> "Clearly there is nothing in the body of the Act exempting exported filled cheese from the ordinary manufacturing tax on other filled cheese".

The case has no bearing on the settled rule of construction of doubtful provisions in favor of the taxpayer.

In *Swan & Finch Co. v. United States,* 190 U. S. 143, 146, the question was whether certain lubricating oils consumed on a vessel bound to a foreign port were "exported" and so entitled to a drawback of the customs duties paid on importation. At page 146 the opinion reads:

"Where the burden is placed upon a citizen, if there be doubt as to the extent of the burden it is resolved in favor of the citizen, but where a privilege is granted any doubt is resolved in favor of the Government. In *Hartranft v. Weigmann*, 121 U. S. 609, 616, the one rule was thus stated: 'We are of opinion that the decision of the Circuit Court was correct. But if the question were one of doubt, the doubt would be resolved in favor of the importer 'as duties are never imposed on the citizen upon vague or doubtful interpretations'" (citing authorities).

Bank of Commerce v. Tennessee, 161 U. S. 134, 146, had to do with the construction of the charter of a corporation (p. 145). The bank claimed that the provisions of the charter exempted it from liability to certain general taxes. The question as in the Indian cases cited, involved the status of the taxpayer and not the construction of a taxing act.

THIRD.

It is further submitted that the decisions of this Court in *Bowers v. Lighterage Co.*, 273 U. S. 346; *United States v. Updike*, 281 U. S. 459, and *Russell v. United States*, 278 U. S. 181, lay down a rule of construction even more favorable to the taxpayer than is involved in the instant case. In each of these cases, the question of construction was whether the statute of limitations had run against the United States. It was strongly urged that in view of the settled rule that the United States is never bound by any statute of limitations unless the statute expressly so provides, the question of construction should be resolved against the taxpayer. In each case it was ruled that because the period of limitation was contained in a taxing statute, the broad general rule of construction in favor of the taxpayer must prevail.

April 19, 1932.

LOUIS TITUS,
HENRY M. WARD,
Amici curiae.